



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.

RENEWAL ARTS CONTRACTING CORP.
Respondent.

OSHRC DOCKET
NO. 92-1907

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 17, 1993. The decision of the Judge will become a final order of the Commission on July 19, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 7, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: June 17, 1993

DOCKET NO. 92-1907

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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Washington, DC 20036 3419

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, :
Complainant, :
v. : Docket No. 82-1907
RENEWAL ARTS CONTRACTING :
CORPORATION, :
Respondent. :
:

Appearances: William G. Staton, Esq.
U.S. Department of Labor
New York, New York

For the Complainant

Brian M. Limmer, Esq.
Merrick, New York

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 *et seq.*, ("the Act"), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Respondent is a corporation engaged in construction, contracting, and related activities. On April 1, 1992, Renewal Arts Contracting's worksite at 21-33 Daly Avenue in Bronx, New York was inspected by an OSHA compliance officer. Subsequently, on May 8, 1992, the company received two citations resulting from this inspection. Respondent was cited for an alleged serious violation of 29 C.F.R. section 1926.404(f)(6) with a proposed penalty of \$2,000. Respondent was also cited for an alleged repeat violation of 29 C.F.R. section 1926.404(b)(1)(i) with a proposed penalty of \$4,000. Respondent filed a timely notice of contest to the citations and penalties. A hearing was held on December 10, 1992, in New York, New York. Both parties were represented at the hearing and neither party filed a post-hearing brief. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

DISCUSSION

Alleged serious violation of 29 C.F.R. section 1926.404(f)(6)

Serious Citation 1, item 1 alleges:

The path to ground from circuits, equipment, or enclosures was not permanent and continuous.

At the hearing on December 10, 1992, the compliance officer, Maureen Smith, testified that during the inspection she had observed a drill being used by Respondent's employee with a grounding pin missing. Similarly, she had examined an extension cord being utilized by Respondent's employee and found the grounding pin missing. The Respondent's project manager, Mr. Rivera acknowledged that he also had become aware of the defective equipment prior to the inspection. Mr. Espejo, the Respondent's superintendent knew or should have known of such defects. When told of the problems which existed with the

equipment, he sent for other equipment. Undisputed evidence demonstrates that the equipment being used lacked a continuous and permanent ground, and presented a shock hazard to Respondent's employees. The evidence further demonstrates that the Respondent either knew or should have known of the hazard, i.e. an inspection of the equipment would have shown its defect and the project manager had knowledge of the condition. Respondent's non-compliance with the standard was proven. Use of the ungrounded equipment could result in shock and burns to the employees. Accordingly, a serious violation has been established.

Alleged repeat violation of 29 C.F.R. section 1926.404(b)(1)(i)
Repeat Citation 2, item 1 alleges:

Employer did not use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites.

The compliance officer testified that Respondent failed to use a ground fault circuit interrupter (GFCI) or an assured equipment grounding conductor program. She testified that a GFCI was not being used by the employee operating a drill. Upon being informed of this, Mr. Espejo, Respondent's superintendent, sent for a ground fault box which on arrival was similarly defective.

The lack of the GFCI or an equipment grounding conductor program was known to the superintendent or should have been known considering the employee was working with electrical equipment which should have been inspected. Such inspection would have shown the obvious defect. The violation has been

established. The lack of the GFCI presented a shock hazard to the employee with possible burns or other serious injury. The Respondent was previously cited for failing to comply with this standard or an equivalent one. Accordingly, the violation is established as a repeat violation. See Potlatch Corporation, 7 BNA OSHC 1061, 1063, 1978 CCH OSHD para. 23,294, p. 28,171 (No. 16183, 1979).

PENALTY

As to the serious violation of 29 C.F.R. section 1926.404(f)(6), the record shows that the Respondent immediately abated the hazard by supplying its employee with equipment which had a continuous or a permanent ground (the new tool had the grounding pin). Additionally, the compliance officer reported that the work was being performed in a dry area thus not exacerbating the shock hazard. Considering these factors, with only one employee at risk and no prior history of a violation of this standard, the gravity of the offense is moderate and a penalty of \$500 is appropriate. As to the repeat violation of 29 C.F.R. section 1926.404(b)(1)(i), a review of all the relevant factors, the hearing transcript, and the official case record fully establishes that the penalty of \$4,000 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law inconsistent with this decision are denied.

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ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. section 1926.404(f)(6), is affirmed and a penalty of \$500 is assessed.
2. Citation 2, item 1, alleging a repeat violation of 29 C.F.R. section 1926.404(b)(1)(i), is affirmed and a penalty of \$4,000 is assessed.

DATED: JUN 16 1993
Washington, D.C.



IRVING SOMMER
Judge